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No. _____

In the

Supreme Court of the United States

October Term, 1982

Alan K. Stuart, *Petitioner*

V.

United States of America, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On appeal to the Eighth Circuit Court of Appeals, the petitioner argued that records obtained for third party banks through an administrative summons procedure, should not have been received in evidence. The Eighth Circuit Court of Appeals declined to consider this question on its merits, holding that it could have been argued in a civil summons enforcement proceeding, in which petitioner had intervened, and that the issue was, therefore, res judicata.

1. The principal question presented for review is whether a civil determination of a fact question can be res judicata in a subsequent criminal case, which ultimately would determine whether or not the Court of Appeals should have considered the petitioner's argument on its merits.

2. A secondary question presented to this Court is whether or not the Internal Revenue Service abused its summons authority by issuing administrative summonses for the purpose of aiding a criminal prosecution, or for the purpose of gathering information to be used by another agency, the Department of Justice.

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PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Alan K. Stuart, the petitioner herein, prays, that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered in the above-entitled case on September 22, 1982, and on October 15, 1982.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 689 F.2d 759 (1982), and is printed in the Appendix hereto, infra, page A-1. The U.S. District Court, Eastern District of Arkansas, rendered an unreported oral opinion which is reproduced in the Appendix hereto, infra, page A-7. The opinion of the Eighth Circuit Court of Appeals in a related prior civil matter is reported at 587 F.2d 929, and is printed in the Appendix hereto, infra, page A-9. The Judgment and Commitment Order of the District Court is printed in the Appendix hereto, infra, page A-12. The Order of the Eighth Circuit Court of Appeals, denying rehearing, is also printed in the Appendix, infra, page A-13.

JURISDICTION

The Judgment of the Court of Appeals was entered September 22, 1982. On October 15, 1982, the Court of Appeals entered an order denying petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner in this case was convicted of the offense defined in 26 U.S.C. §7203, which provides as follows:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

This case involves 26 U.S.C. §7602, which provides as follows:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liabiity, the Secretary is authorized—
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
> (3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

This case arises from a judgment convicting Alan K. Stuart of three counts of willful failure to file income tax returns. The information was filed June 22, 1981. On July 1, 1981, a warrant for Stuart's arrest was issued and executed upon the affidavit of Charles Huckabee, a special agent of the Internal Revenue Service.

At the trial the defendant objected to the introduction into evidence of bank records, because the records were obtained in bad faith by the Internal Revenue Service through an unauthorized administrative summons. The defendant's argument was that the Service is not authorized by Congress to use this process to obtain information for a criminal prosecution.

The government's principal exhibit used to establish the filing requirement was Government Exhibit 77, a computation of "gross income" for the three years in question. The bank records obtained through the issuance of administrative summonses formed the basis for this computation.

Mr. Huckabee testified that in 1977, he was referred a 1976 Form 1040 "protest document" apparently submitted by the defendant, Stuart. The Internal Revenue Service has a specified procedure to follow in the event a "protest document" is received by the Internal Revenue Service Center. In fact, the Service had, in 1977, a Tax Protest Program to deal with this type of document. Immediately upon receipt of such a document, the Service Center, following the procedure outlined in its Tax Protest program, forwards the document to the appropriate district for evaluation by its Criminal Investigation Division.

In Stuart's case, Mr. Huckabee next determined that Stuart was a well driller, and before he contacted Mr. Stuart on December 1, 1922, "a decision was then made" to

begin a criminal investigation. When Stuart was first contacted, a rights form was read to him, similar to a *Miranda* warning. Although Mr. Huckabee testified that an auditor was assigned to the case on December 14, 1977, the auditor had no contact with the administrative summons and did not do anything of substance with respect to the investigation. Another agent was substituted later. Mr. Huckabee explained that the first agent was from the Jonesboro office, and after the records were obtained, it would be more convenient to have a revenue agent in Little Rock to assist.

The Internal Revenue Service did not use the information obtained through the summonses to prepare a return.

On November 24, 1981, a final judgment and commitment was entered by Honorable William R. Overton, United States District Judge in and for the Eastern District of Arkansas, Western Division, in Case No. LR-CR-81-47. The District Court assumed jurisdiction of the case under 18 U.S.C. §3231.

The notice of appeal was filed in the office of the United States District Clerk, Little Rock, Arkansas, on December 3, 1981, nine days after the date of sentencing.

The Court of Appeals had jurisdiction of the appeal under 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS.

The specific question presented for review in the Court of Appeals was whether or not the district court erred in admitting into evidence certain documents obtained through the use of IRS summonses. The petitioner contended at the trial, and on appeal, that the summons process was not utilized for one of the valid civil purposes enumerated in 26 USC §7602, but for the purpose of aiding a criminal investigation. At the trial and on appeal, the petitioner attempted to attack the summonses on the ground that they were not issued in good faith prior to an institutional decision to prosecute.

This court has attempted to resolve the issue before, in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). Nevertheless, the lower courts have been unable to resolve the question of what facts tend to establish "good faith", and which facts establish "bad faith" in the cases which have been reported subsequent to the *LaSalle* decision.

26 U.S.C. §7602 lists the purposes for which Congress conferred the summons authority on the I.R.S. "For the purpose of ascertaining the correctness of any return, making a return where none has been made . . . .", and for other related purposes, the Internal Revenue Service is permitted to issue a summons, on its own authority, to third persons, such as banks, to obtain records of taxpayers' transactions.

Before the enactment of 26 U.S.C. §7602, and its predecessors, the Internal Revenue Service absolutely did not have the authority to issue a subpoena or "summons" to

obtain the records of a taxpayer from third parties without a court order. It is therefore reasonable to assume that the only authority it now has in that regard is the authority granted to it by Congress.

This principal was ably expressed by Justice Blackman, writing for the majority in *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978) "The Service does not enjoy inherent authority to summon production of the private papers of citizens. It may exercise only that authority granted by Congress . . . Congress . . . intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens."

The court discussed in depth the implications of such a misuse of the summons authority in a case where the "sole" purpose of the investigation was to uncover criminal activity, and stated that " . . . the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS."

The conflicts in the decisions of lower courts on similar issues to seem to stem from the fact that in the *LaSalle* case this court, by way of explanation, considered the unlikely possibility that an investigation by the Internal Revenue Service in which records were summonsed from third parties might be for "solely criminal purposes", and have no civil consequences. Unfortunately, nearly all investigations of this type are likely to produce evidence of liability or non-liability for unpaid taxes, civil penalties, and/or interest. Indeed, this court pointed out in the *LaSalle* opinion, that "the institutional responsibility of the Service to calculate and to collect civil fraud penalties and fraudulently reported or unreported taxes is not necessarily overturned by a single agent who attempts to build a criminal case." The court pointed out that the issue is the institutional

purpose for the investigation. This language has apparently led many, but not all, of the lower courts to adopt the theory that institutional good faith is shown if there is any possibility that a criminal investigation may later prove useful in calculating the amount of any taxes which should be assessed.

However, this court went on to say that it would "not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation and would permit the Government to expand its criminal discovery rights." Therefore, the question of whether such a summons may be issued before a recommendation to the Justice Department is left open, and has been subject to various tests in the lower court.

Analyzing *LaSalle*, a California District Court observed in *U.S. v. Dahlstrum*, 493 F. Supp. 966 (1980), that the nature of the inquiry after criminal proceedings have begun is quite different from the inquiry in a summons enforcement proceeding. In the criminal action, the court has the benefit of hindsight in analyzing the purposes for the issuance of the summons. And while several cases have indicated that the test may be whether a recommendation of prosecution had already been made at the time the summons was issued, *Dahlstrum* actually presented a situation where the recommendation came long after the summons.

The facts existing in the *Dahlstrum* case are similar in many respects to the facts which exist in the present case. In *Dahlstrum*, the investigation began May 17, 1976, when a revenue officer in the Collection Division referred the case to the Intelligence Division. On February 3, 1977, a special agent issued a civil summons pursuant to 26 U.S.C. §7602,

with the approval of his group manager. On May 2[illegible], 1977, another revenue officer was assigned to assist the special agent. A joint report was filed by special agent and the revenue officer on January 3, 1982, recommending a criminal prosecution referral and civil fraud penalties. By way of comparison to this case, the investigation of Mr. Stuart began with the receipt by the Internal Revenue Service of a form 1040A "protest document", which was immediately referred to the Criminal Investigation Division pursuant to an established set of procedure in effect at that time within the Service. The special agent was assigned to Mr. Stuart's case, after which a revenue agent was assigned to the case; but the revenue agent had nothing to do with the investigation until the investigation was complete, after which time another revenue agent was assigned to assist the special agent. The revenue agent's report was filed almost simultaneously with the special agent's report, which recommended referral to the Department of Justice.

In the *Dahlstrum* case, the Service had claimed that it was conducting a "joint" investigation, in which its Criminal Investigation Division and its Audit Division were working as a team. The court rejected this contention, and in fact relied heavily on the procedures outlined in the Internal Revenue Manual, spelling out at great length, the need for close cooperation between the special agent and the revenue agent in a joint investigation. The revenue agent had not really had any particular duties to perform in the investigation. Only the special agent did.

It has been further held that the existance of a civil purpose for the investigation as a whole does not render a summons lawful if the purpose of the summons itself is to gather information for solely criminal purposes. Otherwise, the taxpayer would have an impossible burden of proof in trying to establish that there would be no civil tax consequences of an Internal Revenue investigation. *United States v. Genser*, 595 F.2d 146 (3rd Cir. 1979), cert. den., 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979).

In the present case, the government relied on *U.S. v. Schutterle*, 586 F.2d 1201 (8th Cir. 1978), which indicates that in order to show an abuse of the summons procedure, it must be shown by the defendant that there had been an actual, official abandonment of civil tax determination. It is submitted that this situation is so unlikely that in the Eighth Circuit, the guidelines set forth by the Supreme Court in the *LaSalle* case are, for all practical purposes, nullified by the *Schutterle* case.

The *Dahlstrum* case was not followed in *United States v. Barksdale*, 499 F. Supp. 624. There was also an apparent departure from *LaSalle*, *Genser*, and *Dahlstrum*, in *U.S. v. Stuckey*, 646 F.2D 1369 (3rd Cir., 1981), which was a civil summons enforcement proceeding. However, a distinction should be made between a summons enforcement proceeding and a criminal prosecution.

In summary, some of the lower courts apply the *LaSalle* theory liberally, in favor of defendants, while others limit its application in every case and without exception, pointing out that any criminal investigation could conceivably result in the assessment of taxes. These conflicts should be resolved by this Court in order to establish a uniform approach to the use of administrative summonses by agencies, such as the Internal Revenue Service, exercising powers delegated to them by Congress.

II.

THE COURT OF APPEALS ERRONEOUSLY REFUSED TO CONSIDER PETITIONER'S CHALLENGE TO THE ADMISSION OF EVIDENCE OBTAINED THROUGH ADMINISTRATIVE SUMMONSES, BY HOLDING THAT A JUDGMENT IN A CIVIL ACTION IS RES JUDICATA IN THE PRESENT CRIMINAL ACTION.

In its opinion, the Court of Appeals noted that Mr. Stuart previously challenged the IRS summonses. After

Mr. Huckabee, a special agent of the Internal Revenue Service, on March 10, 1978, filed petitions to enforce the summonses, Mr. Stuart intervened to oppose judicial enforcement, as permitted by 26 U.S.C. §7609 (b).

Mr. Stuart appealed from an adverse ruling by the district court in that case, arguing that the summonses had issued improperly without a showing of tax liability, and that they violated his Fifth and Fourth Amendment rights. *United States v. Stuart*, 587 F.2d 929.

Mr. Stuart did not argue at that time that the summonses were being issued to aid a criminal prosecution. In fact, the opinion of the Court of Appeals in that case was that it would affirm the action of the district court precisely because Stuart did not raise these questions.

In considering the defendant's contentions on appeal in the present case, the Court of Appeals noted that Mr. Stuart had previously challenged the IRS summonses, and that he had not in that previous litigation raised the issue of institutional bad faith in issuing the summonses for the purpose of aiding a criminal investigation. The Court's opinion further states that the principal of res judicata bars relitigation of the same claim even where a new theory is advanced as a basis for relief.

The petitioner respectfully submits that certiorari should be granted, and that his arguments relating to the admissibility of bank records (including the "fruits" of bank records) should be considered on their merits, for the following reasons:

1. At the time of the previous civil litigation, wherein Mr. Stuart intervened in a summons enforcement procedure, the fact that the summonses had been issued for an unauthorized purpose (such as aiding the enforcement of criminal tax laws, aiding a criminal investigation, determining whether or not to recommend prosecution, or

gathering information for the use of another agency, the Department of Justice) was not apparent. At that time, it was impossible for Mr. Stuart to determine whether or not a recommendation for prosecution had been or would be made, and there was certainly no way to prove the purposes for that summons, or the intentions of the IRS agents. By contrast, after the filing of the information, and after the liberal discovery permitted in criminal proceedings could be accomplished, Mr. Stuart could be and was better informed as to what institutional decisions were being made at the time of the issuance of the summonses. *United States v. Genser*, 595 F.2d 146 (3rd Cir. 1979), cert. den., 444 U.S., 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979).

2. Issues before the court in a criminal proceeding are entirely different from the issues which are before the court in a civil proceeding. Generally, a judgment of a civil court is not binding upon a court in which a criminal case is being tried, and a judgment rendered in a civil action is not admissible in a subsequent criminal prosecution where the judgment is offered for the purpose of proving facts adjudicated thereby, although exactly the same questions are in dispute in both cases. This doctrine has been held applicable even in cases where the state and the criminal defendant were parties in the civil action. 46 Am.Jur.2d, Judgments, §620; *Helvering v. Mitchell*, 303 U.S. 391, 397; 58 S.Ct. 630; 82 L.Ed. 917 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 54, 8 et seq., 63 S.Ct. 379, 87 L.Ed. 443 (1943); *State of Idaho v. Johnson*, 536 P.2d 295; *Dranow v. United States*, 307 F.2d 545.

3. In a criminal case, different rules as to the weight of evidence, or quantum of proof necessary, prevail.

4. The questions presented by both of Mr. Stuart's challenges to the IRS summonses are similar in several respects to the issues raised in determining questions of search and seizure. In a third party summons enforcement

proceeding, where a taxpayer has intervened to stay enforcement, the action is essentially a civil action. However, search and seizure questions arising under the Fourth Amendment, can be litigated in a civil action for the damages. The issue may then be relitigated in a criminal proceeding if the evidence obtained through the search and seizure is offered as evidence against the accused. It has been held that a different standard of proof is required in a suppression hearing than would be applied in a civil action for damages arising from an illegal search. 68 Am.Jur.2d, Searches and Seizures, §120.

The issue of whether or not a judgment, decree, order, or evidentiary ruling made by a court in a civil action is conclusive on the same court or another court in a subsequent criminal action, is of vital importance, and extends far beyond the concerns of this particular defendant in this particular case. The holding of the Court of Appeals on this question is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's certiorari jurisdiction.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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